

## REMARKS

By this Amendment, the Abstract is amended to correct an informality. In addition, claims 110, 111, 123, 125, 126, 129, 131-134, and 136 are amended, and claim 137 is added. Consequently, claims 110-137 are pending in this application.

For the following reasons, Applicant respectfully requests reconsideration and withdrawal of all of the objection and rejections outstanding in the July 24, 2006 Office Action.

### Objection to Abstract

In the Office Action, the Abstract of the Disclosure is objected to because it exceeds 150 words. In response, Applicant submits herewith a replacement Abstract to replace the existing Abstract. Thus, reconsideration and withdrawal of this objection is respectfully requested.

### 35 U.S.C. § 102(b) Rejection

Claims 110, 117, 120-122, 124-127, 129, 130, and 135 are rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,403,326 to Harrison et al. ("Harrison"). For the following reasons, this rejection should be withdrawn.

Independent claim 110 is directed to a surgical instrument used in an endoscopic fundoplication. The instrument includes, among other things, an elongated tube having a proximal end and a distal end, and a distal member coupled proximate the distal end of the tube. The distal member includes a rotatable member having a connected end and a free end and being configured to rotate between a first position in which the free end is located distally of the connected end and a second position in which the connected end is located distally of the free end.

Independent claim 129 is directed to an instrument for folding multiple tissue layers of a body. The instrument includes, among other things, an elongated tube having a proximal end and a distal end, and a distal member configured to fold the multiple tissue layers together. The distal member has a first member having a proximal end coupled to the distal end of the tubular member and a distal end, and a second member rotatably coupled to the distal end of the first member.

As detailed below, Harrison fails to teach or otherwise suggest the subject matter of independent claims 110 and 129.

Harrison discloses a method of fundoplication of the stomach using a grasper 72 and a stapler 68 disposed on the distal end of an elongate body 80, as best shown in Figs. 8A and 9. The stapler 68 includes movable jaws 66 that move from a position biased open and angled from the longitudinal axis of the elongate body 80 to a position essentially depending from the elongate body 80 and substantially parallel to the longitudinal axis. Although the Office Action lacks clear indication, the Office Action appears to assert that the stapler 68 of Harrison allegedly corresponds to the recited "distal member."

Harrison, however, does not disclose, among other things, a distal member including "a rotatable member having a connected end and a free end and being configured to rotate between a first position in which the free end is located distally of the connected end and a second position in which the connected end is located distally of the free end," as recited in independent claim 110. Instead, the movable jaws 66 of the stapler 68 have free ends that always are located distally of their respective

connected ends, due to their disclosed range of rotational position. Thus, Harrison fails to disclose or otherwise suggest the recited configuration of claim 110.

Harrison also does not disclose, among other things, a distal member including “a first member having a proximal end coupled to the distal end of the tubular member and a distal end” and “a second member rotatably coupled to the distal end of the first member,” as recited in independent claim 129. As is clearly shown in, for example, Fig. 8A, the jaws 66 of Harrison cannot correspond to the recited first and second members since, among other reasons, both jaws 66 are coupled to each other at their proximal ends and those proximal ends are coupled to the distal end of the elongate body 80 (i.e., alleged by the Office Action as corresponding to the recited “elongated tube”). Thus, Harrison also fails to disclose or otherwise suggest the recited configuration of claim 129.

For at least the reasons set forth above, independent claims 110 and 129 patentably distinguish from Harrison. Accordingly, Applicant respectfully requests reconsideration and withdrawal of this rejection under 35 U.S.C. § 102(b) based on Harrison.

### **35 U.S.C. § 103(a) Rejections**

Claims 111-116, 118, 123, 131-134, and 136 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Harrison in view of U.S. Patent No. 5,562,701 to Huitema et al. (“Huitema”). In addition, claims 119 and 128 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Harrison in view of U.S. Patent No. 5,797,960 to Stevens et al. (“Stevens”). Without necessarily agreeing to these rejections, Applicant notes that dependent claims 111-116, 118, 119, 123, and 128

depend from independent claim 110, and dependent claims 131-134 and 136 depend from independent claim 129. As discussed above, independent claims 110 and 129 patentably distinguish from Harrison. Neither Huitema nor Stevens supplies the above-discussed deficiencies of Harrison, and the Office Action also does not allege otherwise. Thus, at least by virtue of their dependency from allowable independent claims 110 and 129, claims 111-116, 118, 119, 123, 128, 131-134, and 136 should also be allowable.

**Conclusion**

Applicant respectfully requests reconsideration of this application, withdrawal of all of the outstanding objection and rejections, and allowance of all pending claims 110-137.

Should the Examiner wish to discuss this case, he is invited to call the undersigned at 202-408-4140.

The Office Action contains a number of statements and characterizations regarding the claims and the related art. Applicant declines to necessarily subscribe to any statement or characterization in the Office Action, regardless of whether it is addressed above.

Please grant any extensions of time required to enter this response and charge  
any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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Dated: October 13, 2006

By:

  
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**Attachment:** Replacement Abstract (1 page)